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5 **THE ARIZONA SUPREME COURT**

6 PETITION TO AMEND) Supreme Court No. R-_____
7 SUPREME COURT)
8 RULES 38, 42 and 46)
_____)

9 Pursuant to Rule 28 of the Rules of the Supreme Court, the State Bar of
10 Arizona ("State Bar") petitions the Arizona Supreme Court to amend Rules 38, 42
11 and 46 of the Rules of the Supreme Court, as set forth in Appendix A, attached
12 hereto.

13 **I. Overview and Summary of Proposed Changes**

14 In-house lawyers are not required to be admitted to the State Bar of Arizona,
15 yet they are allowed to provide legal services to their employer or its
16 organizational affiliates pursuant to Rule 42, Ariz.R.Sup.Ct., specifically ER
17 5.5(d). These lawyers, constituting a group of indeterminate size, are not
18 integrated into the legal community. These lawyers possess a considerable amount
19 of expertise and knowledge in specific areas of the law and yet have no formal
20 avenue to share their collective expertise with other members of the State Bar.

1 Representatives of local in-house counsel associations have expressed their desire
2 to be recognized and affiliated with the State Bar of Arizona. Such inclusion
3 simultaneously provides legitimacy for in-house counsel while allowing the current
4 membership the benefit of association with this group. It will also allow in-house
5 counsel to develop a greater sense of community with other practicing lawyers in
6 Arizona.

7 Those functioning as in-house counsels, who have not elected to become
8 members of the State Bar of Arizona, also represent a group practicing law in
9 Arizona, albeit for a single client. They are not considered to be engaging in the
10 unauthorized practice of law under existing Rule ER 5.5(d)(1) of the Arizona Rules
11 of Professional conduct, but they are subject to this Court's disciplinary jurisdiction
12 in a more limited capacity.¹ This creates a significant gap in this Court's regulatory
13 authority over the profession in Arizona, which the proposed rules would close.
14 Lawyers who secure registration under the Rule would become subject to the
15 Court's disciplinary jurisdiction to the same extent as active members of the State
16 Bar.

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19 ¹ Currently, Rule 46(b) provides the State Bar with disciplinary and disability jurisdiction over a
20 nonlawyer practicing law in Arizona, but the Bar's ability to discipline is limited in that it can only seek
to sanction the nonlawyer or out-of-state lawyers by up to a censure. Matter of Olsen, 180 Ariz. 5, 881
P.2d 337 (1994). This rule change would remove that limitation and allow this Court to suspend or disbar
from practice in Arizona those out-of state lawyers, when appropriate.

1 The proposed rule formalizes and accords official status to all in-house
2 counsel practicing in Arizona. By doing so the State Bar provides an opportunity
3 for in-house counsel to participate in the State Bar's activities. This rule allows in-
4 house counsel to have ownership in the integrity of the profession.

5 This rule requires in-house counsel practicing in Arizona to register with the
6 State Bar of Arizona. To receive a certificate of registration of in-house counsel,
7 the lawyer must demonstrate good standing in each state he or she has been
8 admitted and must certify that the lawyer is working exclusively for the corporate
9 employer.

10 This rule does not negate the need for *pro hac vice* admission and does not
11 permit in-house counsel to practice law not otherwise authorized by these rules.
12 This rule also permits in-house counsel to provide *pro bono* services to clients of
13 legal service organizations, thereby providing an additional opportunity to provide
14 access to justice. In-house lawyers would be required to renew their registration
15 on an annual basis. In-house lawyers would be required to comply with continuing
16 legal education requirements of their home jurisdiction(s).

17 The proposed change to Rule 42, Ariz.R.Sup.Ct., ER 5.5, reflects the
18 requirements of registration of in-house counsel as a pre-requisite to providing
19 legal services to their employer or its affiliates. Continued provision of legal
20 services to an employer without obtaining a certificate of registration of in-house

1 counsel would constitute the unauthorized practice of law. The proposed change to
2 Rule 46(b), Ariz.R.Sup.Ct. specifically subjects registered in-house counsel to the
3 disciplinary and disability jurisdiction of the Court, consistent with the language
4 and intent of proposed Rule 38(g).

5 The rule also provides for a potential waiver of conditions for registration
6 by a petition to the State Bar Board of Governors. This provision allows flexibility
7 and was included to permit the registration of otherwise qualified attorneys
8 licensed in jurisdictions outside of the United States whose requirements and
9 processes for admitting qualified persons to the practice of law do not neatly
10 square with the typical American model.

11 Given the proliferation of multi-state and multi-national businesses in
12 Arizona this is a timely and necessary change. Adoption of this rule would place
13 Arizona among the growing number of states that have adopted either registration
14 of in-house counsel or limited admission of in-house counsel rules.² In light of the
15 benefits to all concerned, the Board of Governors unanimously approved the
16 proposed rules that accompany this petition. It is the Board's considered opinion
17 that the proposed amendments are appropriate and will serve the interest of the
18 legal profession, the Supreme Court and the public at large.

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² Currently, there are 17 states with in-house counsel registration or licensing rules.

1 **II. Text of Proposed Rule Change**

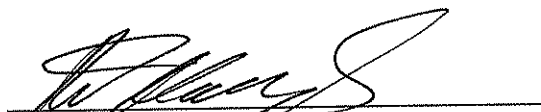
2 The text of the proposed rule changes is attached hereto as Appendix A. The
3 changes are shown in legislative format, with additions shown by a double
4 underline, and deletions shown by strike-throughs.

5 **III. Conclusion**

6 The adoption of the proposed amendments to these two rules would improve
7 the functioning of the legal system, and promote public laws and policies that
8 enhance the profession and support the administration of justice. Thus, the State
9 Bar of Arizona respectfully petitions this Court to amend Rules 38, 42 and 46 of
10 the Rules of the Supreme Court, as set forth in Appendix A.

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12 **RESPECTFULLY SUBMITTED** this 9th day of January, 2008.

13 **STATE BAR OF ARIZONA**

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15 
16 Robert B. Van Wyck,
 Chief Bar Counsel

17 Electronic copy filed with the
18 Clerk of the Supreme Court of Arizona
 this 9th day of January, 2008.

19 by: Kathleen Lundgren
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APPENDIX “A”

PROPOSED NEW Rule 38(g) In-house Counsel.

(1) "In-house counsel" is a person who is admitted to practice and is an active member in good standing as an attorney or counselor at law in another state of the United States, is employed exclusively as in-house counsel in Arizona or a related position for a single for-profit or non-profit corporation(s), association(s) or other organizational entity(ies).

(2) An in-house counsel, who is not a member of the State Bar of Arizona, but is currently a member in good standing of the bar of another state or eligible to practice before the highest court in any state, territory or insular possession of the United States, or admitted to practice in a jurisdiction outside of the United States, in which the lawyer has successfully satisfied a character and fitness investigation, may apply for an Arizona Certificate of Registration of In-House Counsel ("Registration Certificate"), which will allow the lawyer to practice law as in-house counsel in this state. In-house counsel who is eligible for this Certificate must be employed in the state as a lawyer working exclusively for a for-profit or a non-profit corporation, association, or other organizational entity, which can include its subsidiaries and affiliates, the business of which is lawful and is other than the practice of law or the provision of legal services (hereinafter termed "Employer"). Such lawyers may make no court appearances or engage in other activities for which *pro hac vice* admission is required except as permitted by this Rule. The Registration Certificate does not authorize the provision of legal services to the Employer's officers or employees in their personal capacities.

(3) An applicant for a Registration Certificate shall:

- (a) file with the State Bar of Arizona its form of verified application for an Arizona Certificate of Registration of In-House Counsel.
- (b) furnish to the State Bar of Arizona a certificate signed by the licensing authority in each jurisdiction in which the applicant is admitted to practice law, stating that the applicant is licensed to practice law and is an active member in good standing in each of those jurisdictions.
- (c) file an affidavit on a form furnished by the State Bar of Arizona, from an officer, principal, or partner of the applicant's Employer who attests:

- (1) that the applicant is employed exclusively as a lawyer to provide legal services exclusively to the Employer, which can include its subsidiaries and affiliates, and certifies that the applicant will remain an active member in good standing of at least one jurisdiction to which the applicant is admitted to practice law during the entire course of his or her employment;
 - (2) that the nature of the applicant's employment conforms to the requirements of this Rule; and
 - (3) that the Employer shall notify the State Bar of Arizona within ten (10) days upon the termination of the applicant's employment.
- (d) certify that the applicant has read and is familiar with the Arizona Rules of Professional Conduct.
- (e) pay an application fee in the amount determined by the Board of Governors of the State Bar of Arizona.

(4) The application must be filed within 60 days of the commencement of employment. During the period in which a fully completed application for a Registration Certificate is pending with the State Bar of Arizona, the applicant may be employed in the state as an in-house counsel on a provisional basis by an Employer whose affidavit is filed pursuant to section 3(c)(1) above.

(5) Upon a determination by the State Bar of Arizona that the applicant has complied with the requirements of subpart (3) of this Rule, the State Bar of Arizona shall issue to the applicant a Registration Certificate. If an application is rejected, the applicant shall be notified of the reason for the rejection. The applicant shall then have thirty (30) days in which to cure the defect in the application and submit proof of cure. If the applicant fails to provide proof of cure within thirty (30) days of the date of the rejection of the application, the applicant must file a new complete application for registration.

(6) The privileges and responsibilities of practice by in-house counsel issued a valid Registration Certificate in this state shall include all privileges and responsibilities otherwise applicable to active members of the State Bar of Arizona, subject to the limitations of this Rule, including the limitations described in subpart (7) of this Rule. In the event any lawyer holding a valid Registration Certificate ceases to reside in Arizona, but retains a Registration Certificate, that lawyer will continue to be subject to the rules governing the practice of law in Arizona.

(7) A lawyer that has been issued a Registration Certificate under this Rule shall fulfill the requirements for mandatory continuing legal education of the other state(s) or jurisdiction(s) in which that lawyer is admitted to practice. A lawyer registered under this Rule shall practice exclusively for the Employer providing the affidavit required by subpart (3)(c)(1) of this Rule, and shall not offer or provide legal services or advice to the public or hold himself or herself out as being so authorized, except as provided in subpart (9) of this Rule.

(8) Each lawyer issued a Registration Certificate shall report to the State Bar of Arizona, within ten (10) days, any change in employment, any change in bar membership status in any jurisdiction of the United States where the applicant has been admitted to the practice of law, or the imposition of any disciplinary sanction by any federal court, state court or agency before which the applicant has been admitted to practice, or in any state in which the attorney has rendered legal services while temporarily authorized under any rule or by admission *pro hac vice*. An attorney registered pursuant to this Rule who has become employed by a different employer, but continues to meet all of the requirements of this Rule, may seek to transfer the attorney's Registration Certificate to the new employer. Both the attorney and the attorney's new employer shall immediately provide written notification to the State Bar of Arizona of that change in circumstance and file a new employer affidavit, within thirty (30) days of the date of the change of circumstance.

(9) Notwithstanding the provisions of subpart (7) of this Rule, a lawyer registered under this Rule may participate in the provision of any and all legal services *pro bono publico* in Arizona offered under the auspices of organized legal aid societies or State Bar of Arizona projects, or provided under the supervision of a member of the State Bar of Arizona who is also

working on the *pro bono* representation, as set out in Rule 38(e) of these Rules.

(10) A lawyer's authority to practice as in-house counsel as granted under this Rule shall be automatically suspended when:

- (a) employment by the Employer furnishing the affidavit required by this Rule is terminated, except for those lawyers applying for a certificate transfer under subpart (10)(a) of this Rule;
- (b) the lawyer fails to comply with any provision of this Rule; or
- (c) when the lawyer is suspended or disbarred for disciplinary reasons in any jurisdiction of the United States or by any federal court or agency or by any foreign nation before which the lawyer has been admitted to practice.

Any lawyer whose registration is suspended pursuant to subpart (10)(a) above shall be reinstated upon satisfactory evidence that the lawyer has a new Employer who qualifies under subpart 2 of this Rule. A notarized letter from the lawyer, accompanied by an affidavit furnished by the attorney's new Employer, shall suffice for reinstatement, provided that the lawyer attests that there are no other changes to the lawyer's eligibility as required by this Rule.

Any lawyer whose authority to practice is suspended under subparts (10)(b) or (c) of this Rule may be considered for reinstatement upon presentation of satisfactory evidence that the lawyer is fully compliant with all provisions of this Rule.

(11) On or before February 1 of each year, in-house counsel registered pursuant to the provisions of this Rule must file an application for renewal of his or her Registration Certificate, on the form provided by the State Bar of Arizona for that purpose, and pay the renewal fee established by the Board of Governors of the State Bar of Arizona.

(12) A lawyer serving as in-house counsel in Arizona, who fails to register pursuant to the provisions of this Rule shall be:

- (a) subject to professional discipline in this jurisdiction; and

(b) ineligible for admission *pro hac vice* in this jurisdiction; and

(c) referred by the State Bar of Arizona to the Bar admission and/or disciplinary or regulatory authority in each jurisdiction in which the lawyer is admitted.

(13) A lawyer serving as in-house counsel in Arizona and to whom an Arizona Certificate of Registration of In-House Counsel has been issued, shall be identified as "Registered In-House Counsel" on all written communication and documentation, including but not limited to business cards and letterhead stationary.

(14) An applicant may petition the Board of Governors for a waiver of any of the requirements for registration under this rule.

PROPOSED AMENDMENT TO ER 5.5(d)

(a) – (c) No change.

(d) A lawyer admitted in another United States jurisdiction, or a lawyer admitted in a jurisdiction outside the United States, not disbarred or suspended from practice in any jurisdiction, and registered pursuant to Rule 38(g), Ariz.R.Sup.Ct., may provide legal services in this jurisdiction that:

- (1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or
- (2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

(e) – (g) No change.

PROPOSED AMENDMENT TO RULE 46

(a) No change.

(b) **Non-members.** A non-member engaged in the practice of law in the State of Arizona or specially admitted to practice for a particular proceeding before any court in the State of Arizona, a non-lawyer permitted to appear in such capacity, ~~or~~ a foreign legal consultant as defined in Rule 38(b), or in-house counsel as defined in, and registered pursuant to, Rule 38(g), submits himself or herself to the disciplinary and disability jurisdiction of this court in accordance with these rules.

(c) – (f) No change.